Appendix D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

UNITED STATES OF AMERICA

v.

ADOLPHUS SYMONETTE

§ **JUDGMENT IN A CRIMINAL CASE**
§
§
§ Case Number: **0:10-CR-60292-DMM(1)**
§ USM Number: **96092-004**
§
§ Counsel for Defendant: **Ronald Scott Chapman**
§ Counsel for United States: **Mark Dispoto**

Date of Original Judgment: 9/30/2011
AMENDMENT REASON(S):
Direct motion to District Court on Motion to Vacate pursuant to 28 U.S.C. 2255. Conviction on Count Three is vacated and Defendant is resentenced as to Counts One and Two (D.E. 286).

THE DEFENDANT:

☒	pleaded guilty to count(s)	**One and Two**
☐	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☐	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	**Offense Ended**	**Count**
18:1962-7480.F Racketeering	01/30/2011	1ss
18:1201.F Kidnapping	04/30/2009	2ss

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the government's motion.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

January 12, 2021
Date of Imposition of Judgment

Donald M. Middlebrooks
United States District Judge

January 12, 2021
Date

DEFENDANT: ADOLPHUS SYMONETTE
CASE NUMBER: 0:10-CR-60292-DMM(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **LIFE. This term consists of Life as to Count 1 and Life as to Count 2 to run concurrently.**

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ADOLPHUS SYMONETTE
CASE NUMBER: 0:10-CR-60292-DMM(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **FIVE (5) YEARS as to Counts 1 and 2 to run concurrently.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: ADOLPHUS SYMONETTE
CASE NUMBER: 0:10-CR-60292-DMM(1)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at www.flsp.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: ADOLPHUS SYMONETTE
CASE NUMBER: 0:10-CR-60292-DMM(1)

SPECIAL CONDITIONS OF SUPERVISION

Permissible Search: The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

DEFENDANT: ADOLPHUS SYMONETTE
CASE NUMBER: 0:10-CR-60292-DMM(1)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments page.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$200.00	$.00	$.00		

☐ The determination of restitution is deferred until after such determination. An *Amended Judgment in a Criminal Case (AO245C)* will be entered

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the schedule of payments page may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☐ fine ☒ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

Restitution with Imprisonment - It is further ordered that the defendant shall pay restitution in the amount of **$.00**. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of $25.00 per quarter toward the financial obligations imposed in this order. Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, 18 U.S.C. §2259.
** Justice for Victims of Trafficking Act of 2015, 18 U.S.C. §3014.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ADOLPHUS SYMONETTE
CASE NUMBER: 0:10-CR-60292-DMM(1)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payments of $200.00 due immediately, balance due

It is ordered that the Defendant shall pay to the United States a special assessment of $200.00 for Counts 1ss and 2ss , which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court. Payment is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:
FORFEITURE of the defendant's right, title and interest in certain property is hereby ordered consistent with the plea agreement. The United States shall submit a proposed Order of Forfeiture within three days of this proceeding.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

Appendix E

IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Appeal Number: 21-10287-A
District Court Docket No: 20-cv-60773-DMM

ADOLPHUS SYMONETTE,
Appellant.

vs.

UNITED STATES OF AMERICA,
Appellee.
_____/

APPELLANT'S MOTION FOR CERTIFICATE OF APPEALABILITY[1]

Appellant, through undersigned counsel, files this Motion for Certificate of Appealability and in support thereof states the following:

PROCEDURAL HISTORY

1. On September 30, 2011, in Case No. 10-60292-Cr-Middlebrooks, appellant was sentenced to life imprisonment on Counts 1 and 2, *i.e.,* conspiracy to commit racketeering and kidnapping, to run concurrently. He was also sentenced to a consecutive 84 months imprisonment on Count 3, *i.e.,* possession of a firearm in

[1] The instant motion was previously filed in District Court Docket No. 20-cv-60773-DMM. *See* DE 15.

furtherance of a crime of violence, to wit, kidnapping. *See* DE 193 in Case No. 10-60292-Cr-Middlebrooks.

2. On April 14, 2020, the Eleventh Circuit Court of Appeals entered an order granting appellant leave to file a second or successive motion pursuant to 28 U.S.C. § 2255(h). DE 1 in Case No. 20-cv-60773-DMM. The Court ruled that appellant had made a *prima facie* showing that his 18 U.S.C. § 924(c) might be unconstitutional under *U.S. v. Davis*, 139 S.Ct. 2319 (2019).

3. On May 1, 2020, appellant filed a motion under 28 U.S.C. § 2255 to vacate, set aside or correct sentence by a person in federal custody. DE 4.

4. On July 28, 2020, U.S. Magistrate Judge Patrick M. Hunt entered a Report and Recommendation in which the Court recommended that appellant's § 2255 motion be granted and that Count 3 be vacated. DE 9 at 7-8. However, the Court also recommended that a full resentencing was unnecessary.

5. On August 7, 2020 and August 10, 2020, appellant filed objections to the Report and Recommendation insofar as it recommended that a full resentencing was unnecessary. DE 10 and 11.

6. On December 30, 2020, the District Court adopted the Report and Recommendation and granted appellant's § 2255 motion. DE 12 at 3. The Court ruled that Count 3 in the underlying criminal case (Case No. 10-60292-Cr-Middlebrooks) would be vacated by separate order and that appellant's sentence

would be reimposed as to Counts 1 and 2 only. The Court also overruled appellant's objections, determining that a full resentencing was unnecessary. The Court further declined to issue a certificate of appealability.

7. On January 12, 2021, the District Court entered an order in Case No. 10-60292-Cr-Middlebrooks in which the Court vacated Count 3 and reimposed appellant's sentence as to Counts 1 and 2. DE 287. *See also* the Amended Judgment. DE 288.

8. On January 22, 2021, appellant filed a notice of appeal in Case No. 10-60292-Cr-Middlebrooks. *See* DE 289. The Eleventh Circuit Court of Appeals Case No. is 21-10268-AA.

9. On January 26, 2021, appellant filed a notice of appeal in Case No. 20-cv-60773-DMM. *See* DE 13. The Eleventh Circuit Court of Appeals Case No. is 21-10287-A.

10. On February 11, 2021, the District Court entered an Order Denying as Moot the Movant's Motion for Certificate of Appealability. *See* DE 19 in Case No. 20-cv-60773-DMM. In that order, the District Court stated that "to the extent that Movant seeks a ruling from the Eleventh Circuit, he ought to file his Motion with that court." DE 19 at 1-2.

LEGAL STANDARD

28 U.S.C. § 2253(c)(2) provides that an appeal from a final order in a § 2255 proceeding may not be taken without a certificate of appealability ("COA") certifying that "the applicant has made a substantial showing of the denial of a constitutional right." In *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), the Court stated that "[w]here a district court has rejected [a habeas prisoner's] constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."

In *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003), the Court stated:

> . . . In *Slack, supra,* at 483, 120 S.Ct. 1595, we recognized that Congress codified our standard, announced in *Barefoot v. Estelle,* 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), for determining what constitutes the requisite showing. Under the controlling standard, a petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.' " 529 U.S., at 484, 120 S.Ct. 1595 (quoting *Barefoot, supra,* at 893, n. 4, 103 S.Ct. 3383).
>
> . . .
>
> . . . [O]ur opinion in *Slack* held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the

> applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner " 'has already failed in that endeavor.' " *Barefoot, supra,* at 893, n. 4, 103 S.Ct. 3383.
>
> . . .
>
> A prisoner seeking a COA must prove " 'something more than the absence of frivolity' " or the existence of mere "good faith" on his or her part. *Barefoot, supra,* at 893, 103 S.Ct. 3383. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in *Slack,* "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 529 U.S., at 484, 120 S.Ct. 1595.

REASONABLE JURISTS COULD DEBATE WHETHER THE DISTRICT COURT SHOULD HAVE ORDERED A FULL RESENTENCING IN APPELLANT'S CASE

In *U.S. v. Fowler*, 749 F.3d 1010, 1013 (11th Cir. 2014), the defendant was sentenced to life imprisonment for the offense of witness tampering (Count 1), and

he was sentenced to a consecutive ten years imprisonment for the offense of using a firearm during a federal crime of violence, namely, conspiracy to commit robbery and conspiracy to commit bank robbery, and in doing so murdered a police officer, in violation of 18 U.S.C. § 924(c)(1)(A) (Count 2). Following the defendant's appeal, the district court vacated the conviction and sentence in Count 1, *Fowler* at 1014, but the court also vacated Count 2 and sentenced the defendant to life imprisonment on Count 2 stating " 'obviously a ten-year sentence on Count 2 is interrelated with the life sentence I gave on Count 1. I would not have given someone ten years on a murder-with-a-firearm charge standing alone.' " *Id.* at 1014-15.

The defendant objected, arguing that the district court had no authority to resentence him on Count 2 because, for purposes of the "sentencing package doctrine," Count 2 was not interdependent with Count 1. *Id.* at 1015. The defendant argued that the two counts had not been grouped together in the presentence investigation report at his original sentencing. *Id.*[2]

The *Fowler* Court rejected the defendant's argument which was "based on the supposed lack of interdependence between his two original counts of conviction." *Id.* at 1016. The Court stated:

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[2] The § 924(c) count in appellant's case (Count 3) was likewise not grouped with Counts 1 and 2. *See* paragraph 64 of appellant's presentence investigation report in Case No. 10-cr-60292-DMM.

The label "sentencing package doctrine" is a bit of a misnomer. It is not so much a doctrine as it is a common judicial practice grounded in a basic notion of how sentencing decisions are made in cases involving multiple counts of conviction. The notion is that, especially in the guidelines era, sentencing on multiple counts is an inherently interrelated, interconnected, and holistic process which requires a court to craft an overall sentence—the "sentence package"—that reflects the guidelines and the relevant § 3553(a) factors. *See United States v. Martinez,* 606 F.3d 1303, 1304 (11th Cir.2010); *United States v. Gari,* 572 F.3d 1352, 1365–66 (11th Cir.2009); *United States v. Klopf,* 423 F.3d 1228, 1245 (11th Cir.2005). A criminal sentence in a multi-count case is, by its nature, "a package of sanctions that the district court utilizes to effectuate its sentencing intent consistent with the Sentencing Guidelines" and with the § 3553(a) factors. *See United States v. Stinson,* 97 F.3d 466, 469 (11th Cir.1996). The thinking is that when a conviction on one or more of the component counts is vacated for good, the district court should be free to reconstruct the sentencing package (**even if there is only one sentence left in the package**) to ensure that the overall sentence remains consistent with the guidelines, the § 3553(a) factors, and the court's view concerning the proper sentence in light of all the circumstances. *See id.; see also Pepper v. United States,* – —U.S. ——, 131 S.Ct. 1229, 1251, 179 L.Ed.2d 196 (2011) (explaining that because "[a] criminal sentence is a package of sanctions that the district court utilizes to effectuate its sentencing intent," which "may be undermined by altering one portion of the calculus, an appellate court when reversing one part of a defendant's sentence may vacate the entire sentence so that, on remand, the trial court can reconfigure the sentencing plan to satisfy the sentencing factors in 18 U.S.C. § 3553(a)") (alterations, citations, and quotation marks omitted); *Martinez,* 606 F.3d at 1304 ("[W]e have adopted a holistic approach to resentencing, treating a criminal sentence as a package of sanctions that *may* be fully

> revisited upon resentencing.") (citation and quotation marks omitted); *United States v. Mixon,* 115 F.3d 900, 903 (11th Cir.1997) ("If a multicount sentence is a package—and we think it is—then severing part of the total sentence usually will unbundle it.") (quotation marks omitted). The sentence package that has been unpackaged by a reversal is to be repackaged at resentencing using the guidelines and the § 3553(a) factors.

Fowler, 749 F.3d at 1015-16 (emphasis added).

The *Fowler* Court continued on to state that after the federal sentencing guidelines went into effect in 1987:

> . . . We held that with guidelines sentences where one or more counts of conviction are set aside in a § 2255 proceeding, the district court has the authority to resentence the defendant on the remaining counts of conviction, provided that those counts were "interdependent" with the set aside ones, resulting in what could be viewed as "an aggregate sentence." *Mixon,* 115 F.3d at 903 (quotation marks omitted); *see also United States v. Oliver,* 148 F.3d 1274, 1275 (11th Cir.1998). "Aggregate sentence" apparently was collateral speak for "sentence package."
>
> The interdependence requirement for resentencing after a conviction was vacated in a § 2255 proceeding quickly came to be seen as nothing more than was required for resentencing after a conviction was vacated on direct appeal. As long as the district court "viewed the [defendant's original sentence] as a 'package,' " the counts of conviction and the component sentences resulting from them are interdependent enough for the district court to revisit them after one of the components is set aside. *United States v. Watkins,* 147 F.3d 1294, 1297 (11th Cir.1998). When the "sentencing package [becomes]

> 'unbundled,' " we have explained, the district court has the authority to "recalculate and reconsider [the defendant's] sentence for it to comport with the district court's original intentions at sentencing." *Id.* That is as true when the unbundling occurs in a § 2255 proceeding as it is when it happens on direct appeal. So the old distinction based on whether the sentence was set aside in a § 2255 proceeding or on direct appeal did not survive the change from wide open discretionary sentencing to guidelines sentencing. *See Mixon,* 115 F.3d at 903 ("Under the sentencing package concept, when a defendant raises a sentencing issue he attacks the bottom line. That [the defendant's] case came before the district court pursuant to a 2255 petition, rather than a remand from us or by some other means, does not change that fact.") (quotation marks omitted).

Fowler, 749 F.3d at 1016-17.

The *Fowler* Court observed that the district court did not abuse its discretion for two reasons when it resentenced the defendant on Count 2 only:

1. The court viewed the original sentence as being a package; and

2. "**[S]entences that include a mandatory consecutive term of imprisonment, such as the consecutive ten-year sentence that Fowler received on Count 2, 'are particularly well suited to [being] treated as a package' because they 'are inherently interdependent.' *United States v. Townsend,* 178 F.3d 558, 567–68 (D.C.Cir.1999).**" (Emphasis added. Footnote omitted.)[3]

[3] In footnote 5 in *Fowler*, the Court stated that "the fact that Fowler's original counts of conviction were not grouped together under the sentencing guidelines does not negate the district court's authority to reconsider the overall sentencing scheme that it had crafted once Fowler's conviction

The District Court's decision in appellant's case to adopt the Report and Recommendation insofar as it found a full resentencing to be unnecessary runs directly counter to the *Fowler* Court's position that sentences that include a mandatory consecutive term of imprisonment are particularly well suited to being treated as a package because they are inherently interdependent. *Fowler*, 749 F.3d at 1017. The District Court's decision also runs counter to the statement in *Fowler* that "when a conviction on one or more of the component counts is vacated for good, the district court should be free to reconstruct the sentencing package (**even if there is only one sentence left in the package**) to ensure that the overall sentence remains consistent with the guidelines, the § 3553(a) factors, and the court's view concerning the proper sentence in light of all the circumstances." *Fowler*, 749 F.3d at 1015 (emphasis added).[4]

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on Count 1 was vacated. We have repeatedly permitted resentencing where a defendant's counts of conviction have not been grouped together under the sentencing guidelines, and we did so even before the guidelines' grouping rules came into existence. *See Watkins,* 147 F.3d at 1295–97; *Mixon,* 115 F.3d at 901–03; *Stinson,* 97 F.3d at 467–69; *Lail,* 814 F.2d at 1529–30; *Rosen,* 764 F.2d at 765–67." *See also U.S. v. Diaz-Clark,* 292 F.3d 1310, 1318, footnote 7 (11th Cir. 2002) where Judge Middlebrooks wrote, "[w]hile usually applied on direct appeal, we have referred to the sentencing package doctrine in holding that a district court has jurisdiction, after vacating an 18 U.S.C. § 924(c) conviction on a challenge brought in a § 2255 petition pursuant to *Bailey v. United States,* 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), to resentence a defendant on the remaining, unchallenged counts. *See United States v. Watkins,* 147 F.3d 1294 (11th Cir.1998); *United States v. Mixon,* 115 F.3d 900 (11th Cir.1997)."

[4] A relevant circumstance in the instant case is that one of appellant's co-defendants, Kendrick Lewis, obtained relief by way of a §2255 motion in which Lewis made the same argument that appellant made in his §2255 motion where Lewis relied upon *U.S. v. Davis*, 139 S. Ct. 2319 (2019). *See* DE 10 and 11 in *Lewis v. U.S.*, 19-61764-cv-Middlebrooks. Lewis referenced *Fowler* in both DE 10 and 11, and Lewis was resentenced *without* objection from the government. *See* DE 268 and 269 in *U.S. v. Lewis*, 10-60292-Cr-Middlebrooks.

In *U.S. v. Hernandez*, 735 Fed.Appx. 998, 999 (11th Cir. 2018), the defendant appealed the district court's decision to correct his sentence without conducting a full resentencing hearing after the court granted his 28 U.S.C. § 2255 motion to vacate or correct his sentence in light of *Johnson v. U.S.*, 576 U.S. 591 (2015). In spite of the fact that the district judge refused to issue a certificate of appealability, *see* DE 47 in Case No. 05-80042-Cr-Cohn, the Eleventh Circuit Court of Appeals ultimately decided *Hernandez* on the merits and issued a written opinion in which it affirmed the lower court ruling.

In the instant case, the District Court likewise denied a certificate of appealability. *See* DE 12 at 3 in Case No. 20-cv-60773-DMM. Pursuant to 28 U.S.C. § 2253(c)(1), appellant now requests that the Eleventh Circuit issue a certificate of appealability, decide appellant's case on the merits, and order the district court to conduct a full resentencing hearing.

Undersigned counsel contacted opposing counsel in Case No. 21-10268-AA, Assistant U.S. Attorney Jonathan Colan, who stated that the government takes no position on the instant motion at this time.

Undersigned counsel also contacted opposing counsel in Case No. 21-10287-A, Assistant U.S. Attorney Randall D. Katz, but to date opposing counsel has not provided undersigned counsel with the government's position as to the instant motion.

WHEREFORE, appellant, through undersigned counsel, requests that the Court grant this Motion for Certificate of Appealability.

Respectfully submitted,

/s Ronald S. Chapman
Ronald S. Chapman (FL Bar No. 898139)
ronchapman@justiceflorida.com
400 Clematis Street, Suite 206
West Palm Beach, FL 33401
Tel (561) 832-4348
Fax (561) 832-4346
Attorney for Appellant

Certificate of Service

Undersigned counsel certifies that this motion was electronically filed with the Clerk of Court using CM/ECF on February 11, 2021.

/s Ronald S. Chapman
Ronald S. Chapman

APPELLANT'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, appellant, through undersigned counsel, certifies that the following is a complete list of persons and entities who have an interest in the outcome of this case:

Becker, Michael David

Chapman, Ronald Scott

Colan, Jonathan D.

Dickson, Strider L.

Dispoto, Mark

Dixon, Julien

Fajardo Orshan, Ariana

Ferguson, Sam

Ferrer, Wifredo A.

Friedman, Jonathan S.

Gainer, Eddie Lee, Jr.

Greenberg, Benjamin G.

Hopkins, Hon. James H.

Howard, Louis

Howard, Sam

Hunt, Hon. Patrick

Johnson, Hon. Linnea R.

Kasen, Jonathan Brett

Katz, Randall D.

Lewis, Kendrick

McCrae, M. Caroline

Middlebrooks, Hon. Donald M.

Parman, Yachim

Pleasanton, David Frank

Reinhart, Hon. Bruce

Rosenbaum, Hon. Robin S.

Smachetti, Emily

Stefin, Roger H.

Summers, William

Symonette, Adolphus

Toufanian, Cyrus

Vitunac, Hon. Ann E.

Appellant states that he is an individual and not a corporate entity.

/s/ Ronald S. Chapman
Ronald S. Chapman
Attorney for Appellant

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/s/ Ronald S. Chapman
Ronald S. Chapman
Attorney for Appellant

Appendix F

2021 WL 3186792
Only the Westlaw citation is currently available.
United States Court of Appeals, Eleventh Circuit.

Adolphus SYMONETTE,
Petitioner-Appellant,
v.
UNITED STATES of America,
Respondent-Appellee.

No. 21-10287-A
|
Filed: 04/30/2021

Appeal from the United States District Court for the Southern District of Florida

Attorneys and Law Firms

Ronald Scott Chapman, Ronald S. Chapman, PA, West Palm Beach, FL, for Petitioner-Appellant.

Randall Dana Katz, U.S. Attorney's Office, Fort Lauderdale, FL, U.S. Attorney Service, Emily M. Smachetti, U.S. Attorney's Office, Miami, FL, for Respondent-Appellee.

Opinion

Beverly B. Martin, UNITED STATES CIRCUIT JUDGE

***1** ORDER:

Adolphus Symonette is serving a life sentence following his 2011 convictions for conspiracy to commit racketeering in violation of 18 U.S.C. § 1962(c) & (d) ("Count 1"); kidnapping in violation of 18 U.S.C. §§ 1201(a)(1) & 2 ("Count 2"); and possession of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c) ("Count 3"). His Count 3 conviction was predicated on his Count 2 conviction for kidnapping. The District Court sentenced Mr. Symonette to two concurrent terms of life imprisonment for Counts 1 and 2, along with an 84-month consecutive term of imprisonment for Count 3.

In May 2020, Mr. Symonette filed a successive 28 U.S.C. § 2255 motion to vacate and argued that under United States v. Davis, 588 U.S. ——, 139 S. Ct. 2319, 204 L.Ed.2d 757 (2019), his Count 3 conviction under 18 U.S.C. § 924(c)(3)'s residual clause must be vacated after the Supreme Court invalidated that clause as unconstitutionally vague. Id. at 2336. He also argued that if his Count 3 conviction was vacated, he was entitled to a full resentencing hearing on his remaining two convictions. The government did not oppose Mr. Symonette's request to vacate his Count 3 conviction. However, it did oppose his request for a full resentencing hearing.

In July 2020, the Magistrate Judge issued a report and recommendation ("R&R"), recommending that Mr. Symonette's motion to vacate be granted. The Magistrate Judge found that Mr. Symonette was convicted for Count 3 under an unconstitutional provision and, as such, Mr. Symonette's Count 3 conviction should be vacated. However, the Magistrate Judge found that a full resentencing hearing was not necessary because the invalidation of his Count 3 conviction did not affect the total sentence. Even without the Count 3 conviction, Mr. Symonette still faced life imprisonment.

Over Mr. Symonette's objections, the District Court adopted the Magistrate Judge's R&R. The District Court agreed that Mr. Symonette's Count 3 conviction should be vacated and found that Mr. Symonette was not entitled to a full resentencing hearing. It noted that Mr. Symonette's convictions were not interdependent in such a way that the sentence it originally imposed for Count 3 influenced its sentencing decision on his other two counts. As a result, the District Court granted Mr. Symonette's motion to vacate his Count 3 conviction and sentence, re-imposed the life sentences for Counts 1 and 2, and declined to issue a certificate of appealability ("COA").

Mr. Symonette now moves this Court for a COA. He also moves for consolidation of his two pending appeals before this Court, namely, Appeal Nos. 21-10268 and 21-10287. He explains that his original criminal conviction was entered in Case No. 0:10-cr-60292-DMM-l ("Criminal Case"), while his current successive § 2255 motion was handled under Case No. 0:20-cv-60773-DMM ("§ 2255 Case"), before the District Court. When the District Court granted his motion to vacate, it made two separate entries. First, in the § 2255 Case, the District Court ruled that Count 3 would be vacated by a separate order, that his life sentences would be reimposed under Counts 1 and 2, and that it declined to issue a COA. Second, the court entered the separate order in the Criminal Case, vacating Count 3 and reimposing the life sentences for Counts 1 and 2.

*2 On January 22, 2021, Mr. Symonette filed a notice of appeal in the Criminal Case, which created Appeal No. 21-10268 in this Court. Then, on January 26, 2021, Mr. Symonette filed a notice of appeal in the § 2255 case, which generated this current appeal in Appeal No. 21-10287. Both pending appeals relate to the same issue—whether Mr. Symonette was entitled to a full resentencing hearing following the vacation of his Count 3 conviction and sentence. As we have discretion to consolidate appeals, Mr. Symonette's motion to consolidate his appeals is GRANTED. Fed. R. App. P. 3(b)(2); Legal Envtl. Assistance Found., Inc. v. EPA, 400 F.3d 1278, 1279 (11th Cir. 2005) (sua sponte consolidating two appeals due to their factual and procedural similarities).

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the District Court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604, 146 L.Ed.2d 542 (2000) (quotation marks omitted). "[N]o COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law." Hamilton v. Sec'y, Fla. Dep't of Corr., 793 F.3d 1261, 1266 (11th Cir. 2015) (per curiam) (quotation marks omitted).

We review a District Court's choice of § 2255 remedy for abuse of discretion. United States v. Brown, 879 F.3d 1231, 1235 (11th Cir. 2018). In Brown, we clarified, in the context of a § 2255 proceeding, "when a court may summarily correct a sentence and when it is required to conduct a resentencing hearing." Id. When a District Court grants a motion to vacate on the basis of a sentencing error, it must either resentence the petitioner or correct his sentence. Id. Resentencing is essentially "beginning the sentence process anew[,]" while a sentence correction only responds to a specific sentencing error. Id. at 1236. A District Court has broad discretion in choosing which remedy it wants to use. Id. at 1235. When the following factors are present, a District Court's sentence modification under § 2255 requires a hearing with the defendant present: (1) the errors requiring the grant of habeas relief undermine the sentence as a whole; and (2) the sentencing court will exercise significant discretion in modifying the defendant's sentence, "perhaps on questions the court was not called upon to consider at the original sentencing." Id. at 1239.

Here, reasonable jurists would not debate the District Court's denial of Mr. Symonette's request for a full resentencing hearing. Vacating the Count 3 conviction and sentence did not undermine the sentence as a whole. The sentence imposed under Count 3 was a consecutive 84-month sentence that followed Mr. Symonette's two concurrent life sentences for Counts 1 and 2. Vacating the 84-month consecutive sentence had no impact on the life sentence. See Brown, 879 F.3d at 1239. Moreover, in refusing to grant a full resentencing hearing, the District Court reiterated that, at Mr. Symonette's original sentencing hearing, the sentence imposed for Count 3 did not influence the life sentences that were imposed on his other two counts.

Because reasonable jurists would not debate the District Court's denial of Mr. Symonette's claim, his motion for a COA is DENIED.

All Citations

Not Reported in Fed. Rptr., 2021 WL 3186792

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